No. 93-1711

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BETTY ROUSH,

Petitioner,

v.

KFC NATIONAL MANAGEMENT COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONER'S RESPONSE TO BRIEF IN OPPOSITION

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ARGUMENT

(1) Respondent does not deny the existence of a conflict between the decisions of this Court and reigning precedent in the Sixth Circuit regarding whether the amount of a jury verdicts is subject to review by an appellate court. Respondent asserts, however, that in this case "the Court of Appeals did not purport to determine that the weight of the evidence, as a matter of fact, showed the verdict to have been excessive." (Br. Opp., p.9). In fact that is precisely what the Sixth Circuit purported to do.

The threshold question posed by the litigation below was whether a jury verdict of $100,000 for backpay would be

excessive as a matter of fact. In its briefs in the courts below, respondent squarely argued that a back pay verdict of $100,000 was excessive.[1] Petitioner, of course, disputed this challenge to the sufficiency of the evidence to support the jury verdict.[2]

In addressing this dispute, the court of appeals first held that respondent had adequately preserved this factual issue:

> KFC did allow the district court to pass on the issue of the excessiveness of the damages by filing a rather extensive post-trial motion attacking various aspects of the ADEA damage award.

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[1] Defendant's Memorandum In Support of Motion for Judgment Notwithstanding the Verdict or, In the Alternative, For a New Trial, p.8 ("The jury's damage award bears no relationship to the proof adduced at trial") (emphasis added); Defendant's Reply Memorandum In Further Support of Motion for Judgment Notwithstanding the Verdict Or, in the Alternative, For A New Trial, pp. 8-9 ("While the jury verdict may fall within the range established by Roush's expert, that is not enough. The verdict cannot randomly fall within some range, it must be firmly grounded in the evidence .... Where, as here, no basis appears in the record for the jury's award, the damages may constitute 'plain error' and warrant a new trial") (emphasis added); Reply Brief for the Defendant-Appellant, KFC National Management Co., p. 10 ("In short, it is obvious that a mistake has been made: the evidence supports a back pay award of no more than $24,386")(emphasis added).

[2] Brief for Plaintiff/Appellee Betty Roush, p.15 ("Plaintiff lost salary and numerous benefits, pension benefits, stock option plans and more. In addition, there was testimony that Plaintiff was one of the, if not the, lowest paid person in the department and that her pay raises were considerably less than others in the department.... The jury may well have decided that as part of her back pay that situation should be remedied. If they did, it could easily have brought a back-pay award, considering all elements, to in excess of $100,000").

(Pet. App. 7a)(Emphasis added). Next, the Sixth Circuit spelled out a standard for evaluating such an excessiveness claim:

> This court reviews the district court's decision on a motion for a new trial seeking a remittitur of a jury's verdict for an abuse of discretion. . . . Such a motion should be granted only "if the award clearly exceeds 'the amount which, under the evidence in the case, was the maximum that a jury could reasonably find to be compensatory' for the plaintiff's loss."

(Pet. App. 7a)(Emphasis added; citations and emphasis omitted). The court of appeals then overturned the jury verdict on precisely that evidentiary basis:

> [N]o rational appraisal of the evidence supports a back pay award of $100,000.
>
> [T]he jury's award ... was simply clearly excessive even using the figures supplied in Roush's own evidence. The jury's award of backpay was required to be reasonable and within the range of proofs in the case.

(Pet. App. 8a, 8a n.7)(Emphasis added).

Having concluded that a $100,000 award of back pay was excessive, the court of appeals proceeded to make its own determination of the appropriate level of back pay. The Sixth Circuit correctly recognized that such a fact-based determination required it to make subsidiary findings of fact regarding the amount of "lost earnings ... (less interim earnings from other employment and pension and social security benefits which Roush received as a result of her discharge); lost contributions to KFC's savings plan; lost

social security benefits, and lost retirement benefits." (Pet. App. 14a). Most of these amounts were disputed.[3] Nonetheless, the court of appeals, having made undisclosed subsidiary findings on each of those elements of back pay, then made a finding of fact as to the maximum permissible back pay verdicts:

> Based on the proofs presented at trial by Roush, her damage award for back pay should be reduced to $24,386, which is the maximum amount a jury could reasonably find to be compensatory for her loss.

(Pet. App. 14a). (Emphasis added) The Sixth Circuit acknowledged that petitioner had offered proof of discrimination in compensation, but refused to include this in its own backpay calculations because it believed there was not "sufficient evidence in the record" as to the amount of damage occasioned by this violation of the ADEA. (Pet. App. 14a n.13) (Emphasis added).

(2) Respondent asserts that the court of appeals

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[3] In the court of appeals petitioner and respondent contended that the relevant figures were as follows:

	Petitioner's Contention	Respondent's Contention
Net lost earnings	$36,000	$ 6,941
Lost contributions to KFC savings or investment plan	$17,284	$ 6,180
Lost social security benefits	$14,000	$ 5,053
Lost retirement benefits	$17,050	$ 6,212
Total	$84,334	$24,386

Brief for Plaintiff/Appellee Betty Roush, pp.15-16 n.1; Reply Brief for Defendant-Appellant KFC National Management Company, pp.8-9.

overturned the jury verdict because of a "legal error" regarding whether petitioner could properly be awarded front pay. (Br. Opp. 5)[4].

In fact, however, the court of appeals reached the front pay issue only after it had held that a back pay verdict of $100,000 was excessive. The front pay question as the Sixth Circuit saw it was whether, having overturned the back pay award, the court of appeals should remand the case for further proceedings regarding front pay. It was in this context that the propriety of front pay was discussed by the court of appeals:

> While ordinarily we would remand the issue of front pay to the district court for a more detailed articulation of the reasons for its action (and, alternately, for a new trial on the issue of front pay), we conclude that remand in this case would serve no purpose, because the record simply does not support an award of front pay in any amount.

(Pet App. 13a)[5]. Manifestly the court of appeals' decision not to remand this issue was not the basis for its earlier finding that a $100,000 back pay verdict was excessive. The fact that the district judge believed that front pay was appropriate did not, in the view of the court of appeals, infect the jury verdict, since the Sixth Circuit construed the jury instructions not to authorize inclusion of front pay in the verdict.

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[4] Contrary to respondent's assertion (Br. Op. 7), petitioner does challenge the propriety of the Sixth Circuit's analysis of the front pay issue. Petition, pp. 12-14.

[5] The Sixth Circuit's refusal to remand this issue was based on its assessment of the evidence in the case, not on any question of law. (Pet. App. 13a-14a).

(3) Respondent does not deny that the decision of the Sixth Circuit directly reducing the amount of the jury verdict, rather than ordering a new trial subject to a remittitur, conflicts with decisions of this Court and five other circuits. Nor does respondent deny that this case squarely presents this issue. Respondent argues only that the Sixth Circuit's practice is the correct one.

Respondent defends the Sixth Circuit's order by insisting "the Court of Appeals merely eliminated the front pay component." (Br. Op. 11). But this is not a case in which a jury returned one verdict for back pay and a separate verdict for front pay; as both courts below stressed, there was only a single damage award of $100,000 (Pet. App. 7a n.6, 26a). The court of appeals did not purport to know how much front pay was included in the verdict, or whether in fact the jury had intended to include front pay at all. (Pet. Ap. 7a, n.6). The court of appeals did not arrive at the court-ordered verdict of $24,386 by "eliminating" front pay, or anything else, from the $100,000 verdict; rather, $24,386 was the sum that the Sixth Circuit calculated was "the maximum amount" a jury should have awarded for back pay. (Pet. App. 14a). This is precisely the circumstance in which the decisions of this Court, and of other circuits, hold that a plaintiff must be accorded the choice of accepting a remittitur or proceeding to a new trial.

The difference between the Sixth Circuit directive reducing the size of the jury verdict, and a constitutional order according petitioner a choice between a new trial and a remittitur, was of palpable practical importance. The court of appeals disapproved an award of front pay because on its view "the record simply does not support an award of front pay." (Pet. App. 13a)(Emphasis added). Had the court of appeals directed a new trial as to the amount of damages, petitioner would have had an opportunity to offer additional evidence to address the defect which the appellate court perceived in the record of the first trial.

(4) Respondent suggests that this is not an appropriate case in which to address these issues because the court of appeals opinion makes no mention of the Seventh Amendment. (Br. Op. 6, 8). In fact, however, the court of appeals' silence on this issue reflects the magnitude of the problem warranting review by this Court. Although the Sixth Circuit routinely reviews and overturns jury verdicts, decisions in that circuit, like the decision in the instant case, are ordinarily characterized by a "complete absence of any discussion of the Seventh Amendment." (Br. Op. 8). The court of appeals decision in the instant case cited five other Sixth Circuit decisions regarding judicial review of jury verdicts[6]; none of these Sixth Circuit precedents refer in any way to the Seventh Amendment. Among the last decade of Sixth Circuit decisions reviewing either jury liability determinations or the amount of jury verdicts, we have been unable to locate any which mention the Seventh Amendment as relevant to that appellate factfinding.

(5) Respondent does not deny that there is a conflict among the circuits regarding whether the sufficiency of the evidence should be measured against the standard set out in an unchallenged jury instruction.

Respondent urges that petitioner failed to preserve this issue by "cit[ing] ... approvingly" in the court of appeals the stringent standard ultimately applied in the Sixth Circuit's opinion. (Br. Op. 12-13). The passage referred to

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[6] *Agristor Leasing v. A.O. Smith Harvestore Prods., Inc.*, 869 F.2d 264, 268 (6th Cir. 1989) (Pet. App. 7a); *In re Lewis*, 845 F.2d 624, 635 (6th Cir. 1988) (Pet. App. 7a); *Rodgers v Fisher Body Division, General Motors Corp.*, 739 F.2d 1102, 1107 (6th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985) (Pet. App. 14a n.13); *Drayton v Jiffee Chem. Corp.*, 591 F.2d 352, 366 (6th Cir. 1978) (Pet. App. 8a n 7); *Manning v. Altec, Inc.*, 488 F.2d 127, 133 (6th Cir. 1973) (Pet. App. 7a).

by respondent from petitioner's court of appeals brief, however, is merely a quotation from the district court opinion. Brief for Plaintiff/Appellate Betty Roush, p.24. The actual argument advanced by petitioner in the Sixth Circuit repeatedly invoked instead the standard that had been contained in the jury instruction; petitioner insisted that the evidence in support of her claim of intentional infliction of emotional distress was sufficient because it revealed conduct that was "outrageous and extreme." *Id.* at 19 ("outrageous"), 20 ("outrageous") 22 ("extreme and outrageous"), 24 ("extreme and outrageous.") Petitioner's brief in the court of appeals focused specifically on the legal standard set out in the jury instructions: "[a] jury of six people was asked to measure ... the totality of the ... circumstances indicating extreme and outrageous behavior." *Id.* at 22.

In its closing argument at trial, respondent, consistent with the unobjected to jury instruction, agreed that petitioner was obligated to prove only that respondent's conduct was "outrageous" and "intentional."[7] In the court of appeals, however, respondent urged the Sixth Circuit to apply, not that standard, but a requirement that a defendant's conduct go "beyond all possible bounds of decency, and ... be ... utterly intolerable in a civilized community."[8]

Respondent now urges that the Sixth Circuit viewed these two formulations of the legal standard as interchangeable." (Br. Op. 13). This is only true in the sense that the court of appeals believed that "under Kentucky law" the requirement of "extreme and outrageous

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[7] Tr. vol. 5, p. 514.

[8] Brief for the Defendant-Appellant KFC National Management Company, pp. 9, 26, 28; Reply Brief for the Defendant-Appellant KFC National Management Company, p. 12.

conduct" had been construed by state courts to be "particularly stringent, requiring proof of conduct which goes beyond 'all possible bounds of decency.'"(Pet. App. 15a) (Emphasis added). But neither the Sixth Circuit nor respondent suggest that a jury would or should have understood "extreme" or "outrageous" to mean, in ordinary English, "beyond all possible bounds of decency" or "utterly intolerable in a civilized society." Indeed, by describing Kentucky caselaw as "particularly stringent", the Sixth Circuit frankly emphasized that state judicial decisions had established a standard of proof considerably more strict than, rather than simply synonymous with, the ordinary meaning of the phrase "extreme and outrageous." In the court of appeals respondent prevailed precisely because it insisted with success that Kentucky case law, rather than merely embodying the ordinary English meaning of the words "extreme" and "outrageous," had established "an extremely high evidentiary standard."[9] Respondent urged, "Simply put, the burdensome proof requirements erected by the Kentucky courts have made recovery for the tort of outrage virtually nonexistent."[10] Having successfully persuaded the court of appeals that Kentucky caselaw established a standard far more specific and stringent than the ordinary meaning of the phrase "extreme and outrageous," respondent cannot plausibly argue in this Court

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[9] Reply Brief for the Defendant-Appellant, KFC National Management Company, p.11; see also Brief for the Defendant-Appellant, KFC National Management Company, pp. 25 ("exacting standards established by the Kentucky courts"), 30 ("the extremely rigorous standard established by Kentucky courts").

[10] Brief for the Defendant-Appellant, KFC National Management Company, p.29.

that no such special standard was ever applied by the Sixth Court.

Respectfully submitted,

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